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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

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REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI"), by its attorneys, hereby files its reply comments on the Second Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

In these reply comments, TCI responds to those commenters who assert that the Commission has the authority to abrogate or restrict MDU exclusive contracts. These commenters cite various

[1] In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment; and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 97-376 (rel. Oct. 17, 1997) ("Inside Wiring Order" or "Second FNPRM").

sections of the Communications Act -- including sections 4(i), 151, 207, 253, 303(r), 601, 623, and 628 -- and various Commission and judicial precedent in an attempt to piece together a jurisdictional basis for such Commission action. However, none of these sections or precedent, either alone or in combination, form the necessary jurisdictional predicate. Indeed, the very disparity and scattershot nature of the claimed jurisdictional bases for Commission action belies the existence of any such authority. This is especially true given Congress' clear directive with respect to the MDU owner-MVPD relationship that "mak[ing] cable service available to the greatest number of individuals ... can be achieved in a better, more orderly manner through a negotiated agreement between the cable operator and the property owner, and not by legislative fiat ...."[2]

Moreover, the fact that a significant group of building owners and managers representing a substantial number of MDUs across the country strongly opposed any Commission intervention reinforces that there simply is no basis for the Commission to abrogate or restrict MDU exclusive contracts.

Certain commenters attempt to justify governmental intervention by asserting that any benefits from exclusive MDU contracts redound solely to MDU owners who act only in their own self-interest, rather than in the interests of their tenants. As TCI demonstrated in its initial comments, however, this contention

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2 16 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields).

is simply false. The consumer benefits that result from MDU exclusive contracts are real and significant. Under many of the MDU exclusive contracts it has signed, for example, TCI offers the tenants substantial bulk price discounts off its standard cable rates in the franchise area. Indeed, the Commission itself, in the Inside Wiring Order, based its decision in large part on the fact that competition in the MDU real estate market means that the benefits provided by MVPDs to MDU owners in exchange for exclusivity will flow to MDU tenants. The Commission cannot cite the fact that MDU exclusive contracts will benefit MDU tenants as support for its new inside wiring rules without also acknowledging that these benefits undercut any rationale for restricting exclusive MDU contracts in this proceeding.

In the end, when all the rhetoric and hyperbole is stripped away from these commenters' statements, the Commission is left with a self-serving request for a regulatory handicap. As TCI and other commenters demonstrated, there is no basis for according different regulatory treatment to cable and non-cable MVPDs in this area. In fact, the suggestion by certain non-cable MVPDs that without a government handicap they will be unable to flourish in the MDU marketplace is squarely at odds with recent Commission findings on the vibrant state of competition in the MDU marketplace and the intensity with which non-cable MVPDs are pursuing significant new MDU business strategies and investments.

For these reasons, TCI respectfully urges the Commission to refrain from implementing the proposals in the Second FNPRM or any restrictions on exclusive MDU contracts.

II. NOTHING IN THE COMMENTS PRESENTS A JUSTIFIABLE BASIS FOR THE COMMISSION'S AUTHORITY TO ABROGATE OR RESTRICT EXCLUSIVE CONTRACTS BETWEEN MDU OWNERS AND MVPDS.

In its initial comments, TCI demonstrated that the Commission lacks the statutory authority to abrogate or restrict exclusive contracts between MDU owners and MVPDs.[3] Several parties support and amplify this conclusion.[4] While a few parties assert that the Commission does have jurisdiction to adopt such restrictions, as shown below, none of these assertions withstands analysis.

A. Section 623 and Section 4(i)[5]

Ameritech argues that the Commission has authority under sections 623 and 4(i) of the Communications Act to prohibit MDU exclusive contracts because such a prohibition is necessary to promote MVPD competition which, in turn, will ensure reasonable cable rates.[6] Ameritech has fundamentally misread Congress' directive to the Commission under section 623, and misapplied the Commission's ancillary jurisdiction under section 4(i).

Contrary to Ameritech's suggestion, section 623 does not empower the Commission to regulate cable rates _indirectly_ through

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3 _See_ Comments of TCI at 5-18.

4 _See, e.g.,_ Comments of National Cable Television Association at 3-4; Comments of Time Warner Cable at 5-6; Comments of U S WEST at 3-4.

5 The discussion below with respect to section 4(i) applies equally to section 303(r) since both provisions use nearly identical terms.

6 Comments of Ameritech at 9-10. _See also_ Comments of Bell Atlantic at 6; Comments of RCN Telecom Services at 14.

actions designed to promote competition. Rather, section 623 only authorizes the Commission to regulate cable rates directly (through the adoption of rate formulas, complaint procedures, and review mechanisms) in the absence of competition.[7] Ameritech cites the title of section 623(a)(2) -- "Preference for Competition" -- as support for its argument that "Congress expressed a clear preference for competition as a means of [ensuring reasonable cable rates]."[8] But that is not what section 623(a)(2) says. Rather, it says that if a cable system is subject to effective competition, then neither the Commission nor a local franchising authority may regulate the rates of that system. In other words, competition is referenced in section 623(a)(2) to indicate the point at which the Commission's cable rate rules may no longer be applied, not, as Ameritech asserts, to indicate Congress' preference that non-rate mechanisms (such as restrictions on MDU exclusive contracts) be used to promote competition as an indirect method of ensuring reasonable cable rates.

Nor does section 4(i) expand section 623's limited jurisdictional grant. Any ancillary jurisdiction the Commission

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7 See, e.g., 47 U.S.C. § 543(a)(2) ("If the Commission finds that a cable system is not subject to effective competition ... the rates for the provision of basic cable service shall be subject to regulation by a franchising authority ... under subsection(b) [and] the rates for cable programming services shall be subject to regulation by the Commission under subsection(c).") (emphasis added). See also the titles of section 623 ("Regulation of Rates"), section 623(b) ("Establishment of Basic Service Tier Rate Regulations"), and section 623(c) ("Regulation of Unreasonable Rates") (emphasis added).

8 Comments of Ameritech at 9.

may have under 4(i) to adopt additional rules to ensure reasonable cable rates arises only if such rules are: (1) "not inconsistent with" any other provision of the Communications Act; and (2) necessary in the execution of the Commission's rate regulation function.[9] Neither of these prongs is satisfied in this case. First, there is a fatal inconsistency here in that section 623(a)(1) expressly precludes all efforts to regulate cable rates unless such regulation is specifically authorized by section 623 itself or by section 612 (leased access):

> No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under [section 623] and section 612.[10]

Since restrictions on MDU exclusive contracts are not "provided [for] under [section 623] and section 612," section 623(a)(1) specifically precludes reliance on 4(i)'s ancillary jurisdiction to authorize the adoption of such restrictions. Stated another way, the Commission cannot rely on its ancillary jurisdiction under 4(i) to override or frustrate a specific congressional directive.

Second, restrictions on MDU exclusive contracts are not necessary to ensure reasonable cable rates to MDUs because such rates are already reasonable. As TCI pointed out in its initial comments, in exchange for an exclusive agreement, MDU owners often

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[9] Section 4(i) reads, in its entirety, as follows: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions" (emphasis added).

[10] 47 U.S.C. § 543(a)(1).

demand and receive a "bulk agreement" under which the prices for the MDU tenants are significantly discounted from the operator's standard regulated rates to individual residences in the franchise area. In fact, in its latest statement on the issue, Congress itself recognized that because of intense competition in the MDU marketplace, MDU cable rates already are reasonable and therefore that the Commission should lessen, rather than expand, its regulatory oversight over MDU rates.[11] Where congressional intent is clear, as it is here, the Commission is not at liberty to supplant Congress' policy decisions, even if the Commission believes a different policy is more appropriate.[12] This is especially true where Commission imposition of restrictions on exclusive MDU contracts could actually result in increased cable

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11 See H.R. Rep. No. 204, 104th Cong., 1st Sess. 109 (1995) (eliminating uniform rate structure requirement in MDUs because cable operators need greater pricing flexibility due to the presence of other MVPDs offering the same service).

12 See, e.g., Time Warner Entertainment Co., L.P. v. FCC, 56 F.3d 151, 190-191 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 911 (1996) (striking down the Commission's uniform rate structure regulation because it sought, contrary to the plain language and structure of the 1992 Cable Act, to regulate systems subject to effective competition).

This congressional determination is fully consistent with the Commission's own repeated statements regarding the uniquely competitive nature of the MDU marketplace. See Rate Regulation, Third Order on Reconsideration, 9 F.C.C.R. 4316, at ¶ 20 (1994) (noting that competitors in the MDU market have become "important footholds for the establishment of competition to incumbent cable systems"); In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, CS Docket No. 97-141, FCC 97-423 at ¶ 129 (rel. Jan. 13, 1998) ("Technical, regulatory and programming supply developments appear to be contributing to the emergence of a distinct MDU market, which is more competitive than other MVPD markets.").

rates for MDU tenants by either limiting competition among MVPDs to serve an MDU or by reducing an MVPD's incentive to offer bulk discounts or other benefits to an MDU which it might otherwise have offered absent such regulatory restraints.[13]

B. Section 601, et al.

For similar reasons, the Commission cannot infer authority to restrict MDU exclusive agreements from the general provisions in the Communications Act to promote competition in the MVPD industry, promote diversity, or make telecommunications services available to the public.[14] The Commission can only restrict exclusive MDU contracts pursuant to a clear congressional mandate.[15] None of these sections provide such a specific mandate. Rather, they simply set forth general congressional objectives that the Commission must strive to achieve using the specific powers Congress delegated to it elsewhere in the statute. For example, as NCTA stated with respect to the "promoting competition" objective:

> Section 601(6) simply confirms that one of the purposes of the framework of regulatory authorizations and

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13 See Comments of TCI at 21-25. See also id. at 14-16 for a further discussion of the jurisdictional limitations of sections 4(i) and 303(r) in this context.

14 See, e.g., Comments of Ameritech at 10 (citing 47 U.S.C. § 521(6) on promoting competition in cable communications); Comments of Bell Atlantic at 1 (citing 47 U.S.C. § 521(4) on promoting diversity of information and services); Comments of DirecTV at 8 (citing 47 U.S.C. § 151 on making available to everyone nationwide wire and radio communication services); Comments of RCN Telecom Services at 14 (citing 47 U.S.C. § 253(d) as a basis for the Commission to preempt state laws that permit exclusive contracts if they interfere with the federal policies of promoting competition).

15 See Comments of TCI at 5-7.

> prohibitions contained in Title VI is to promote competition. It does not impose on the Commission (or state or local governments) any general responsibility to promote competition outside the scope of that regulatory framework, nor does it grant any residual authority to do so.[16]

Indeed, if TCI's analysis were not correct, that would mean that any action by the Commission could be authorized in the name of promoting MVPD competition. For example, the Commission could theoretically order all cable operators nationwide to stop adding new subscribers for a six month period. While such an action would certainly "promote MVPD competition," the Commission cannot adopt such a rule because, notwithstanding the Act's policy objective of promoting MVPD competition, such a specific draconian measure is not authorized by any section of the Communications Act. The same is true with respect to the abrogation or restriction of MDU exclusive contracts.

C. Section 628

Contrary to Bell Atlantic's assertion, the program access requirements do not give the Commission authority to abrogate or restrict exclusive contracts between MDU owners and MVPDs.[17] Both the plain language of section 628 and its legislative history make clear that this section is designed to promote nondiscriminatory access to certain satellite programming and governs only the contractual relationship between satellite programmers and cable

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16 Comments of NCTA, filed in CS Docket No. 95-184, MM Docket No. 92-260, on Sept. 25, 1997, at 12.

17 See Comments of Bell Atlantic at 5.

operators (and common carriers). The Commission has expressly recognized this statutory focus.[18] Nothing in section 628 even suggests a basis for the Commission to intervene in the contractual relationship between MDU owners and MVPDs.

Moreover, even assuming arguendo that section 628(b) served as a basis for the Commission to restrict exclusive MDU contracts, it could only do so on a case-by-case basis and only where the complainant MVPD made the particularized showing of significant harm required by section 628(b) and the Commission's rules.[19]

D. Section 207

DirecTV's assertion that section 207 of the 1996 Act authorizes the Commission to "strike down" or restrict exclusive contracts between MDU owners and MVPDs is simply wrong.[20] Section 207 serves the narrow purpose of directing the Commission to prohibit restrictions that impair a viewer's ability to receive over-the-air video programming signals using, among other things, a

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[18] See, e.g., Program Access Order, 8 F.C.C.R. 3359, at ¶ 1 (1993) ("Section 628 is intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern access by competing multichannel systems to cable programming services.") (emphasis added); Program Carriage Agreements Order, 9 F.C.C.R. 2642, at ¶ 3 (1993) ("The program access provisions of the 1992 Cable Act ... primarily restrict the activities of vertically integrated programming vendors with respect to cable operators and other multichannel programming distributors.").

[19] See 47 U.S.C. § 548(d) (requiring case-by-case adjudications of complaints under section 628(b) or 628(c)); 47 U.S.C. § 548(e) (authorizing the Commission to impose remedies only after completion of an adjudicatory proceeding).

[20] See Comments of DirecTV at 7-9.

DBS dish.[21] The Commission's rules implementing section 207, as well as the preemption decisions issued by the Commission pursuant to this provision, have correctly interpreted section 207 as authorizing an individual resident in an MDU to place a DBS dish, for example, on property in the MDU which the resident owns and exclusively controls, notwithstanding existing governmental or private restrictions to the contrary.[22]

Section 207 cannot be read to authorize the Commission to abrogate or restrict an exclusive contract between an MDU owner and an MVPD. At most, section 207 precludes the MDU owner or MVPD from asserting that their exclusive agreement bars an individual resident from directly subscribing, for example, to a DBS service by purchasing and installing a dish on property which the resident owns and exclusively controls. TCI does not claim that any of the exclusive agreements which it has with MDU owners preclude such activity by any of the residents in the MDU. Nor would TCI assert that the MDU owner is in breach of its exclusive contract with TCI if a resident in the MDU owner's complex were to subscribe directly to DBS in this manner.

DirecTV is attempting to contort the reading and intent of section 207 to grant a mandatory right of access to all MDUs for a select class of over-the-air video providers. Not only would such

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21 H.R. Rep. 204, 104th Cong., 1st Sess. at 123-24 (1995).

22 See, e.g., 47 C.F.R. § 1.4000(a); In re: Jason Peterson Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000, DA 98-188, (rel. Feb. 4, 1998), at ¶ 9.

a requirement constitute a taking under the Fifth Amendment,[23] but it would be a taking that could not be made constitutionally permissible merely by providing "just compensation." This is because, wholly apart from matters of compensation, the Commission may not impose a taking unless it is "expressly" authorized by Congress to do so.[24] Section 207 provides no such express authorization.[25]

Finally, the Commission just four months ago held that the record in this proceeding provides an insufficient basis to even address the propriety of such a federal mandatory access law[26] and that section 207 could not be used in this proceeding to justify a federal right of access to MDUs for certain video providers.[27]

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[23] See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[24] See Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1447 (D.C. Cir. 1994) ("Applying the strict test of statutory authority made necessary by the constitutional implications of the Commission's action, we hold that the Act does not expressly authorize an order of physical co-location, and thus the Commission may not impose it."). For similar reasons, the Second FNPRM's proposal to allow MDU owners to abrogate existing exclusive contracts and obtain an incumbent's wiring as long as the MDU owner pays the incumbent compensation, Second FNPRM at ¶ 260, is an impermissible taking since it is a forced taking of the incumbent's property without express congressional authority.

[25] This is especially true given that section 207 contains no grant to the Commission of new express authority. By its terms, the section invokes only prior-existing authority in section 303 of the Communications Act. See 1996 Act, § 207 ("the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions ....") (emphasis added).

[26] See Inside Wiring Order at ¶ 179.

[27] Id. at n. 495.

Nothing has changed in these intervening four months that could or should alter this Commission determination.

E. Sierra-Mobile Doctrine

One party cited to Western Union Tele. Co. v. FCC, 815 F.2d 1495, 1501 (D.C. Cir. 1987), for the proposition that the Commission has authority to modify provisions of private contracts when necessary to serve the public interest.[28] In reaching this conclusion, the D.C. Circuit relied on the Sierra-Mobile doctrine, as established by the Supreme Court in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956), and FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956). However, the Sierra-Mobile doctrine actually confirms that the Commission cannot abrogate private contractual rights unless it has authority pursuant to clear congressional intent.[29]

The Sierra-Mobile doctrine has been applied only in cases where Title II of the Communications Act required the Commission to modify rate-setting contracts in order to conform them to filed tariffs.[30] These cases relied on the Sierra-Mobile doctrine for

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[28] Comments of Wireless Cable Association at n. 25.

[29] The Supreme Court interpreted the statutes in those cases, the Natural Gas Act and the Federal Power Act, respectively, to allow the agencies to override rates set in existing contracts if the agency could show that the rates were unjust or unreasonable. Mobile Service, 350 U.S. at 339-40; Sierra Pacific, 350 U.S. at 353-55. See also Papago Tribal Utility Authority et al. v. FERC, 610 F.2d 914, 924 (D.C. Cir. 1979) (Federal Power Act allows FERC to prescribe rates).

[30] The cases involved contracts and a subsequent settlement agreement regarding rates to common carriers for leasing special access facilities. See Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975);
(continued ...)

the principle that regulatory agencies are restricted from permitting a regulated entity from unilaterally abrogating their private contracts by filing an inconsistent tariff.[31] Under this doctrine, agencies may only abrogate or modify private agreements where necessary to bring contract rates into compliance with rates prescribed by law.[32] Even in those instances, however, the private contract may only be abrogated where the rate established in the private contract is "so low as to adversely affect the public interest -- as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[33] As the Commission has noted, the Sierra-Mobile doctrine has no application outside this highly limited context.[34] Thus, the Sierra-Mobile doctrine provides no basis for the Commission to restrict exclusive MDU contracts between MDU owners and MVPDs.

(... continued)

MCI Telecommunications Corp. v. FCC, 665 F.2d 1300 (D.C. Cir. 1981); Western Union Tele. Co. v. FCC, 815 F.2d 1495 (D.C. Cir. 1987).

31 See Bell Telephone, 503 F.2d at 1281 ("We find neither in this section [204] nor in any other provision of the Act an indication that Congress intended to allow carriers to abrogate intercarrier contracts by means of subsequently filed tariffs."); MCI Telecommunications, 665 F.2d at 1302; In the Matter of AT&T Communications Contract Tariff No. 360, 11 F.C.C.R. 3194, at ¶ 11 (1995).

32 See Western Union, 815 F.2d at 1501 n. 2; ACC Long Distance Corp. v. Yankee Microwave Inc., 10 F.C.C.R. 654, at ¶ 15 (1995).

33 ACC Long Distance Corp., 10 F.C.C.R. 654, at ¶ 17.

34 In the Matter of AT&T Contract Tariff No. 360, 11 F.C.C.R. 3194, at ¶ 11.

To the contrary, the Sierra-Mobile cases provide a further basis for why the Commission may not interfere with such agreements. As the Supreme Court and other courts have recognized, the Sierra-Mobile doctrine is a pro-contract policy that, whenever possible, requires a regulatory agency to preserve or give substantial weight to private contracts.[35] Thus, contrary to Wireless Cable Association's assertion, the Sierra-Mobile line of cases require the Commission to refrain from interfering with or restricting exclusive contracts between MDU owners and MVPDs.

F. Commission Precedent Restricting Exclusive Agreements

Bell Atlantic cites four instances where the Commission has restricted exclusive agreements as support for the Commission's authority to abrogate or restrict exclusive contracts between MVPDs and MDU owners: 1) the Commission's program access rules; 2) the prohibition on territorial exclusivity for broadcast stations; 3) the restriction on exclusive agreements between LECs and foreign carriers; and 4) the prohibition on exclusive retransmission consent agreements.[36] However, this precedent provides no support

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35 Union Electric Co. v. FERC, 890 F.2d 1193, 1194 (D.C. Cir. 1989) (holding that FERC improperly gave no weight to parties' proposals on methodology to determine rates).

36 It is worth noting that Bell Atlantic's expansive view of the Commission's discretion to regulate private contracts in this case stands in stark contrast to Bell Atlantic's repeated assertions that the Commission is all but impotent when it comes to regulating LEC agreements with competing local carriers. See, e.g., Reply Brief for Petitioners Regional Bell Companies and GTE in Iowa Utilities Board v. FCC, No. 96-3321 and consolidated cases (8th Cir), filed on January 6, 1997, at 7 ("Nor can the holes in the FCC's textual argument be filled with its grab bag of general rulemaking provisions. It cannot be inferred solely from an agency's general rulemaking power, without a specific grant of (continued ...)

for placing restrictions on exclusive contracts between MVPDs and MDU owners. To the contrary, these cases actually support TCI's position that the Commission is not authorized to abrogate or restrict private contracts unless Congress clearly authorizes or directs it to do so.

- Program Access. The Commission's restrictions on exclusive contracts between certain satellite programmers and cable operators were adopted pursuant to explicit congressional directives in the statute to impose such contractual restrictions.[37]

- Territorial Exclusivity. The Commission's territorial exclusivity rules restricting the ability of broadcast stations to enter into exclusive agreements with broadcast networks were adopted pursuant to direct congressional authority "to make special regulations applicable to radio stations engaged in chain broadcasting."[38] Because "chain broadcasting" is, by definition, the contractual relationship between stations and their networks, this statutory language specifically authorized the Commission to restrict that contractual relationship.[39]

- Foreign Carrier Restrictions. The Commission's restrictions on exclusive contracts between common carriers and foreign carriers were adopted pursuant to a myriad of Title II provisions granting the Commission broad and plenary authority over all activities of common carriers and specifically authorizing the Commission to regulate "any contract with any common carrier not subject to this Act, for the exchange of

(... continued)

statutory jurisdiction, that Congress intended the agency to intrude upon the traditional province of the States.").

37 See 47 U.S.C. §§ 548(c)(1)(C), (D).

38 See 47 U.S.C. § 303(i).

39 Equally important, the Commission has broad authority over broadcast licensees and is specifically authorized by Congress to impose restrictions on such entities as a condition of grant or renewal of an FCC license.

their services" which the Commission deems to be "contrary to the public interest."[40]

- Retransmission Consent. A similar jurisdictional predicate existed for the Commission's decision to prohibit exclusive retransmission consent agreements. First, a broadcaster's retransmission consent right is a "right created by the Communications Act."[41] Second, this right "vests in a broadcaster's signal"[42] over which, as noted above, the Commission has plenary jurisdiction. Third, prior to Congress' creation of this right, because of the compulsory copyright process, broadcasters had no right either to demand payment for the retransmission of their signal or to enter into exclusive carriage deals. Thus, the Commission's determination did not abrogate or limit existing private contract rights, but merely defined the limits of the new rights Congress granted to broadcasters when it adopted the retransmission consent provisions.

Unlike the foregoing cases, there is no indication anywhere in the language of the Communications Act or in its legislative history that Congress intended the Commission to interject itself in the relationship between MVPDs and MDU owners at all, much less to abrogate or restrict MDU exclusive contracts. In fact, as TCI noted in its initial comments, Congress expressed precisely the opposite intent regarding the MDU owner-MVPD relationship, stating that "mak[ing] cable service available to the greatest number of individuals ... can be achieved in a better, more orderly manner

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40 47 U.S.C. § 201(b). See also 47 U.S.C. § 211 (requiring all common carriers to file with the Commission copies of all agreements with all other carriers, including carriers not subject to the Communications Act); 47 U.S.C. § 214(c) (empowering the Commission in granting a certificate to a common carrier to impose any restrictions or conditions on such grant which the Commission deems to be required by the public convenience and necessity).

41 See Must Carry Order, 8 F.C.C.R. 2965, at ¶ 173 (1993).

42 Id.

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through a negotiated agreement between the cable operator and the property owner, and not by legislative fiat ...."[43] In light of this congressional intent, Bell Atlantic's cited cases are inapposite, and the Commission is without authority to abrogate or restrict exclusive contracts between MDU owners and MVPDs.

G. Fresh Look

While certain commenters offer varying proposals on how the Commission should implement a fresh look process in this context, they all overlook one critical fact: The Commission may not authorize a private party to abrogate a contract via fresh look when the Commission itself has no authority to do so. It is well established that the Commission may not circumvent the limits on its authority by authorizing other parties to do what it cannot do directly.[44] Thus, the limits discussed above and in TCI's initial comments that prevent the Commission from directly abrogating MDU exclusive contracts apply with equal force to any attempt by the Commission to achieve such abrogation indirectly via a "fresh look" mechanism.

The fact that the Commission has imposed "fresh look" in the past does not alter this conclusion. Rather, Commission precedent demonstrates that "fresh look" may only be used in highly limited

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[43] 16 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields).

[44] See, e.g., Richmond Power & Light of the City of Richmond, Indiana v. FERC, 574 F.2d 610, 620 (D.C. Cir. 1978) ("[W]hat the Commission is prohibited from doing directly it may not achieve by indirection.") (citations omitted).

circumstances and pursuant to clear congressional authority. The Commission has generally only imposed "fresh look" in order to correct common carrier rates in private contracts that had previously been found to be unreasonable in violation of express congressional directives in sections 201 through 205 of the Communications Act.[45]

The Commission has recently affirmed the statutory restraints on its ability to impose "fresh look" outside of these limited contexts. In its Universal Service proceeding, the Commission declined to adopt a "fresh look" requirement that would have obligated carriers with existing service contracts with schools and libraries to participate in a competitive bidding process.[46] As the Commission recognized, the imposition of "fresh look" was not authorized because "there is no suggestion in the statute or the legislative history that Congress anticipated abrogation of existing contracts in this context."[47] As demonstrated above, not only is there no suggestion that Congress "anticipated abrogation of existing contracts" between MDU owners and MVPDs, there is also conclusive evidence of a congressional intent not to interfere with such contracts.

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45 See Comments of TCI at 19-20 and n. 48 for a citation to all cases in which the Commission has authorized fresh look.

46 See Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776, at ¶ 547 (rel. May 8, 1997).

47 Id.

III. THE BENEFITS WHICH MDU TENANTS RECEIVE AS A RESULT OF MDU EXCLUSIVE CONTRACTS WITH MVPDS PROVIDE A STRONG PUBLIC POLICY BASIS FOR AVOIDING COMMISSION INTERFERENCE WITH SUCH AGREEMENTS.

In addition to the jurisdictional limitations discussed above, there are sound public policy reasons which preclude the Commission from abrogating or restricting exclusive contracts between MDU owners and MVPDs. Specifically, because an exclusive MDU agreement provides significant efficiencies to an MVPD, an MDU owner that is willing to offer such an agreement to an MVPD is also in the position to demand concessions in terms of lower prices and/or enhanced services from the MVPD.[48] Moreover, given the intense level of competition MDU owners face to attract tenants, the benefits that the MDU owner is able to extract from an MVPD in exchange for the granting of exclusive access to the MDU will be passed on to the tenants in that MDU. An MDU owner will enter into an exclusive contract with an MVPD if the benefits, in terms of making the MDU more attractive, outweigh the costs of not allowing each resident to choose his or her own service provider.

While a few commenters dispute the benefits that flow from exclusive MDU contracts, they rely on little more than an unsupported assertion that MDU owners act not in the interests of their tenants but in their own self-interest. Thus, they conclude

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[48] See Comments of TCI at 21-25.

that any benefits that flow from exclusive MDU contracts redound solely to the MDU owner.[49]

This contention is incorrect. The consumer benefits that result from MDU exclusive contracts are real and significant. As TCI noted above and in its initial comments, under many of the MDU exclusive contracts it has signed, among other things, TCI offers the tenants substantial price discounts off its standard cable rates in the franchise area.[50] Moreover, the Commission itself, in the Inside Wiring Order, based its decision in principal part on its recognition of the fact that competition in the MDU real estate

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[49] See, e.g., Comments of Media Access Project and Consumer Federation of America at 4. See also Comments of Cox at 4-5. But see Comments of Building Owners and Managers Association, et al. at 4 ("It is the economics of the video programming providers' business that dictate the need for exclusive contracts ... not the building owners.").

[50] A number of commenters described the significant consumer benefits that are made possible by exclusive MDU agreements. See e.g., Comments of Building Owners and Managers Association, et al. at 3 ("[E]xclusive contracts often not only promote competition, but more importantly promote delivery of service. Without exclusive contracts, many buildings might not have any kind of video programming service.") (footnote omitted); Comments of Community Associations Institute at 3-4 (same); Comments of Independent Cable & Telecommunications Association ("ICTA") at 8-9 ("The property owner, because it represents a large group of customers as a 'package,' is able to negotiate a far better deal from the service provider than a single tenant with no leverage. Because the owner is itself faced with competition in the rental market, it has every incentive to ensure that the chosen provider will offer the highest quality services at competitive prices so that potential tenants will be attracted to the property. The provider, in turn, is able to use exclusivity as the means to unlock supracompetitive offerings. ... [Thus,] ICTA believes that longer term exclusive contracts are a prerequisite to competition, not a hindrance.").

market means that the benefits provided by MVPDs to MDU owners in connection with an exclusive agreement will redound to MDU tenants:

> We continue to believe that, in rental MDUs, market forces will compel MDU owners in competitive real estate markets to take their tenants' desires into account. ... MDU owners must compete with rival owners to keep current residents and attract additional residents. In this context, an MDU owner that agrees to an exclusive contract in exchange for a monetary payment but does not somehow flow that payment through to its residents (e.g., a new swimming pool, a security system, or discounting the rent below the competitive level) is vulnerable to competition from similarly situated MDUs offering a more attractive mix of price and amenities to prospective tenants. If the MDU owner tries to simply keep the payment, new tenants will not be as attracted to the building and existing tenants will have an additional reason to relocate to another MDU (e.g., an otherwise similar residence where, to attract tenants, the owner has utilized its exclusive access payment to reduce rent or improve amenities).[51]

In short, since exclusive contracts often cause MVPDs to extend additional benefits to MDU owners, and since MDU owners will pass these benefits along to their tenants to remain competitive in the real estate market, any restrictions that the Commission were to impose on exclusive MDU contracts would simply reduce the potential benefits to MDU tenants. Seen in this light, the marketplace itself will be the best arbiter of the restrictions, if any, which apply to exclusive MDU contracts. In fact, the

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[51] Inside Wiring Order at ¶ 61 (emphasis added). See also id. at ¶ 42 ("We disagree that the building-by-building procedural mechanism does not benefit consumer choice because it merely substitutes one MVPD for another. ... Generally, MVPDs encounter an environment in which the MDU owner must compete with similarly-situated MDU owners to attract and retain tenants. ... MVPDs competing for the right to serve the building generally will have to offer the mix of video service quality, quantity and price that will best help the MDU owner compete in the marketplace.").

Commission only four months ago agreed with this conclusion in its Inside Wiring Order:

> We believe that [MDU owners will pass on the benefits of MDU exclusive contracts to their tenants and therefore that] consumer welfare will be maximized by letting the market determine the appropriate mix of price and amenities in the MDU marketplace.[52]

The Commission cannot cite the fact that MDU exclusive contracts will result in benefits to MDU tenants as support for its new inside wiring rules without also acknowledging that these benefits undercut any rationale for restricting exclusive MDU contracts in this proceeding.

IV. THE FACT THAT THE MDU OWNERS STRONGLY OPPOSE ANY COMMISSION ABROGATION OF OR RESTRICTIONS ON MDU EXCLUSIVE CONTRACTS FURTHER REINFORCES THE LACK OF ANY BASIS FOR COMMISSION INTERVENTION IN THIS AREA.

MDU owners and managers have a direct and substantial interest in the outcome of this proceeding. As the comments of the Building Owners and Managers Association, et al. -- a group which represents a very significant percentage of the MDUs in the United States ("BOMA et al.") -- make clear, MDU owners and managers strongly oppose governmental abrogation or restriction of MDU exclusive

52 Id. at ¶ 61.